

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SABRINA D. MITCHELL**

Claimant

VS.

**JOHNSON COUNTY & BOARD OF  
COMMISSIONERS**

Self-Insured Respondent

Docket No. 1,031,598

**ORDER**

**STATEMENT OF THE CASE**

Respondent requested review of the February 27, 2009, Award and the March 2, 2009, Nunc Pro Tunc on Award entered by Administrative Law Judge Marcia L. Yates Roberts. The Board heard oral argument on July 8, 2009. Michael W. Downing, of Kansas City, Missouri, appeared for claimant. Bart E. Eisfelder, of Kansas City, Missouri, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant had a 10 percent permanent partial impairment to both the right and left upper extremities as a result of her repetitive work activities at respondent in 2006.

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

Respondent requests review of the ALJ's finding that claimant sustained an accidental injury or series of accidents or repetitive use injuries. Respondent further contends that claimant's job duties resulted in only a temporary aggravation of her preexisting injury and an award of permanent partial disability is not supported by the evidence. In the event the Board finds claimant suffered an accidental injury or series of injuries in the course of her employment, respondent asserts that she did not suffer any impairment over and above her preexisting impairment.

Claimant requests that the Award and Nunc Pro Tunc on Award be affirmed.<sup>1</sup>

The issues for the Board's review are:

(1) Did claimant's injuries arise out of and in the course of her employment with respondent?

(2) Is an award of permanent partial disability supported by the evidence, or did claimant's injuries only result in a temporary aggravation of a preexisting injury?

(3) Did claimant suffer permanent impairment over and above her preexisting impairment?

#### **FINDINGS OF FACT**

Claimant started working for respondent in 1999, first as an accounting assistant, then as a purchasing administrator. In March 2006, she began working as a data entry operator, a position she still holds. Although both her jobs as an accounting assistant and purchasing administrator required her to perform data entry, her current position is more hand-intensive. She now spends eight hours a day entering data. After beginning her current position, she began to have pain in her wrists and palm areas, as well as a burning sensation from her wrists up towards her elbows.

Claimant suffered previous work-related injuries to her upper extremities in 2000. At the time, she was sent by respondent to Dr. J. Douglas Cusick. An EMG revealed that she had bilateral carpal tunnel syndrome, and Dr. Cusick performed carpal tunnel release surgeries on her hands in January and February 2001. The surgeries were successful. Dr. Cusick last saw claimant on May 30, 2001, at which time she reported only mild discomfort and numbness on the radial aspect of the left hand. She said her strength had returned to normal and she had only very early fatigue and low grade soreness at the end of a long working day. Using the 5th Edition of the *AMA Guides*, Dr. Cusick found that claimant had a 4 percent permanent partial impairment to her right upper extremity and a 6 percent permanent partial impairment to her left upper extremity.<sup>2</sup> Her workers compensation claim was settled in November 2001 based on an award of 6 percent permanent partial impairment to the body as a whole.

On September 27, 2006, claimant reported her symptoms to respondent. She was sent to Corporate Care in October 2006, where she was given medication and sent to

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<sup>1</sup> Although claimant's bilateral injuries give rise to a presumption of permanent total disability, claimant is not alleging she is permanently totally disabled. At the time of the regular hearing, claimant was still employed by respondent and performing her regular job.

<sup>2</sup> R.H. Trans., Cl. Ex. 1 at 3.

physical therapy. She was given a restriction limiting the number of minutes she could type per hour to 50, and then she was to take a break. When her symptoms did not improve, she was sent for an EMG and was referred to Dr. Anne Rosenthal, a board certified orthopedic surgeon. The EMG, performed by Dr. Gordon Kelley on October 26, 2006, revealed a symmetric marginal decrease in function of the median nerves through the wrists bilaterally. Although Dr. Kelley was not certain, he suggested that this finding could be a residual of previous pre-operative injury to the nerve, a result of scarring of the nerve, or a sign of recurrent dysfunction of the nerve. The findings fell into the minimal/mild range.

Dr. Rosenthal first saw claimant on November 8, 2006, for a consultation and treatment. Claimant complained of pain and numbness in both upper extremities and pain into her forearm. She said her right hand went numb once, and both hands went numb at nighttime. She complained of pain in both wrists. During the examination, Dr. Rosenthal was not able to bring on any of claimant's pain. Claimant's grip strength was normal. Her Semmes-Weinstein test was normal. She had no tenderness with distraction, but she had a jump sign when Dr. Rosenthal touched her when she knew she was being touched for tenderness. When claimant did not realize she was being palpitated for tenderness, she had no pain. After examining claimant, Dr. Rosenthal diagnosed her with overuse of both hands. She recommended that claimant continue to work at full duty. She sent claimant to occupational therapy, and she also told claimant to consider another job if she felt the one she was doing was too difficult.

Dr. Rosenthal next saw claimant on December 13, 2006, at which time claimant said that the occupational therapy was not of any benefit. At that visit, claimant denied any numbness or tingling. Dr. Rosenthal recommended that claimant see a physiatrist.

Dr. Rosenthal saw claimant again on September 24, 2007. At that time, claimant was complaining of numbness in her hands and pain in her forearms. She denied clicking or popping in her fingers or thumbs on either hand. During her examination of claimant, Dr. Rosenthal found that she had breakaway weakness, which is indicative of submaximal effort. Claimant had been seen by Dr. Lynn Ketchum, who had found that claimant's grip strength had gone up to 60 pounds, her Semmes-Weinstein was still normal, and she had no events of triggering on either hand. Dr. Ketchum diagnosed claimant with very mild bilateral carpal tunnel syndrome, overuse syndrome in her bilateral upper extremities, and stenosing tenosynovitis in her bilateral thumbs and right middle finger. He recommended multiple injections. However, claimant had no events of triggering in either hand when seen by Dr. Rosenthal, and, in Dr. Rosenthal's opinion, the absence of trigger finger rebutted Dr. Ketchum's opinion that she had tenosynovitis.

Dr. Rosenthal released claimant from treatment in September 2007. She opined that claimant has a 0 percent of additional impairment as a result of her continued work at respondent over and above what Dr. Cusick had already given her. She did not think

claimant was in need of any further medical care secondary to her continued data entry work.

Dr. Brad Storm, a board certified plastic surgeon, examined claimant on December 20, 2007, at the request of respondent for a diagnosis and recommendations for further treatment. All his examination findings were within normal limits, with the exception that claimant had tenderness when he performed the Tinel's test. However, he said that was not a positive Tinel sign because she had no radiating pain proximally or distally. All other findings were negative or within normal limits.

Dr. Storm opined that claimant's symptoms are probably functional symptoms, meaning that her body is not keeping up with what she is asking it to do. He could not find any specific injury that would have a surgical option and recommended she change her job duties. He diagnosed her with nonspecific tendonitis and recommended she try a steroid injection of the carpal tunnel as a diagnostic and therapeutic maneuver. He performed the injection on claimant's right wrist on March 3, 2008. Claimant, however, did not see any significant improvement from the injection, even short term, which indicated to Dr. Storm that scarring around her nerve from the surgery or tendonitis was not her diagnosis.

Dr. Storm last saw claimant on March 31, 2008, after the steroid injection. He did not identify a work-related disease as causing her complaints but said that her symptoms were made worse by her work. Regardless, he does not believe claimant had a change in impairment due to her work activities at respondent. He opined, based on the *AMA Guides*,<sup>3</sup> that claimant had no permanent impairment over and above that which had already been assessed by Dr. Cusick for her previous injury.

Dr. Michael Poppa is board certified in occupational and preventative medicine. He examined claimant on June 12, 2008, at the request of claimant's attorney. At the time he saw claimant, she was employed by respondent as a data entry operator. She told him she performed data entry 100 percent of her work day.

Claimant complained to Dr. Poppa of soreness and tightness in the base of her bilateral thumbs. She said she had constant burning in her bilateral forearms that worsened with repetitive duties at work. She also reported that her wrists were weak, which was made worse with repetitive data entry. She continued to work despite her symptoms. Her pain complaints interfered with her sleep and activities of daily living. Dr. Poppa testified that claimant had a combination of symptoms best categorized under the heading of overuse syndrome. She had physical findings consistent with mild carpal tunnel syndrome, bilateral forearm flexor tendonitis, and chronic myofascial syndrome. Dr. Poppa

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<sup>3</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

agreed that some of the complaints claimant had when she saw him were similar to those she had in 2001 when she was released by Dr. Cusick.

Upon examination, claimant complained of pain on palpation overlying the proximal palmar aspect of each hand. She had increased muscle tension consistent with a regional myofascitis. She had findings consistent with flexor tendonitis. She demonstrated symmetrical hand grip and prehensile pinch grip. Her reflexes were symmetrical, pinprick showed no sensory loss, she opposed all digits to the palm, and all muscle testing was symmetrical, all of which were normal findings.

Dr. Poppa believed that claimant's employment at respondent caused or substantially contributed to her present conditions. It was his opinion that claimant should undergo a repeat EMG as recommended by Dr. Storm, and if those studies reveal evidence of increased prolongation involving the median nerves of the wrists, surgical exploration would be required. He believed that claimant should continue with nighttime splinting of her hands. He felt she should try to alternate repetitive work duties with nonrepetitive work duties.

Dr. Poppa opined that claimant had reached maximum medical improvement. Based on the *AMA Guides*, Dr. Poppa rated claimant as having a 10 percent permanent partial impairment to both her right and left upper extremities, all of which is from her series of accidents ending September 27, 2006. This 10 percent would be over and above any previous impairment.

#### **PRINCIPLES OF LAW**

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>4</sup>

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<sup>4</sup> K.S.A. 2008 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>5</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>6</sup>

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>7</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>8</sup> An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.<sup>9</sup>

K.S.A. 2008 Supp. 44-501(c) states: "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

### ANALYSIS

Claimant's increase in symptoms coincided with her change of positions with respondent to a more hand-intensive job. This temporal connection suggests a causal connection between claimant's bilateral hand, wrist and forearm problems and her work

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<sup>5</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>6</sup> *Id.* at 278.

<sup>7</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

<sup>8</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

<sup>9</sup> *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

at respondent. Claimant testified that she had been symptom free before the job change and relates her current symptoms to her work activities since March 2006. The medical experts agree that claimant's job duties caused her symptoms. They disagree, however, on her diagnosis, restrictions, and whether she has suffered additional permanent impairment. Dr. Rosenthal believes claimant has no additional permanent impairment. Dr. Storm, who likewise examined claimant at the request of respondent, acknowledged claimant's increased symptoms but did not think those symptoms translated into additional permanent impairment of function. Whereas Dr. Poppa assigned claimant a 10 percent permanent impairment of function rating to each upper extremity, which he opined were the result of claimant's work activities and were over and above claimant's previous impairments for her carpal tunnel syndrome and 2001 surgeries. The ALJ adopted the opinions of Dr. Poppa. She was impressed that even though Drs. Rosenthal and Storm gave claimant no new percentage of impairment, claimant clearly had symptoms that were affecting both her work and her activities of daily living.

However, both doctors documented a new diagnosis of overuse syndrome and recommended a change in occupation. These new symptoms that she developed performing her work duties in 2006 have affected her not only in the workplace, but also interfere with her activities of daily life. Prior to the change of position in 2006, Claimant was able to perform her work symptom-free. She did not seek any type of medical treatment over that five-year time period. It simply is not credible that she has sustained no new impairment. Dr. Poppa was the only testifying physician to assign impairment to these new symptoms and diagnoses and his opinion is thereby adopted by the court. Claimant has sustained 10% impairment to each upper extremity as a result of the repetitive work activities performed at work in 2006.<sup>10</sup>

The Board agrees with the ALJ's findings and conclusions. Claimant's injuries are consistent with the repetitive nature of her work. Her current symptoms likely include residuals of her prior carpal tunnel syndrome and also involve an aggravation of that preexisting condition, but they are primarily due to a new condition. These multiple injuries and symptoms are mostly described within the diagnosis of overuse syndrome.<sup>11</sup> Respondent is not entitled to a preexisting impairment credit for this new condition. Respondent would be entitled to a credit for any portion of Dr. Poppa's impairment rating that was for the preexisting carpal tunnel syndrome conditions. There is no medical opinion apportioning any part of the 10 percent bilateral upper extremity ratings to the preexisting carpal tunnel syndrome conditions or surgeries.<sup>12</sup>

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<sup>10</sup> ALJ Award (Feb. 27, 2009) at 6.

<sup>11</sup> Dr. Poppa also diagnosed claimant with bilateral flexor tendinitis, bilateral median nerve neuritis, regional myofascitis and pain.

<sup>12</sup> Furthermore, Dr. Cusick's ratings were based upon the 5th edition of the *AMA Guides* rather than the statutorily required 4th edition.

**CONCLUSION**

(1) Claimant suffered new injuries to her bilateral upper extremities in the course of her employment with respondent through a series of accidents ending September 27, 2006.

(2) & (3) Claimant's injuries resulted in a 10 percent permanent impairment of function to each upper extremity at the level of the arm.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the February 27, 2009, Award and the March 2, 2009, Nunc Pro Tunc on Award of Administrative Law Judge Marcia L. Yates Roberts dated are affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant  
Bart E. Eisfelder, Attorney for Self-Insured Respondent  
Marcia L. Yates Roberts, Administrative Law Judge